The Nation's Thank-offering.

By Nathan Haskell Dole.

Oh, God of Waste and Destruction,
We are proud of our splendid show—
A nation's mighty production,
The weapons of war and of woe!
For miles up the glorious river
The battleships, armored in steel,
Their ear-splitting volleys deliver
And their roar makes the city reel.

The smoke is the incense we offer
On the altar of death and of hate;
Its cost is poured from the coffer
Of the whole world's peacefulest State.
Each gun eats a workman's wages—
The keep of a wife and a child;
We squander the wealth of long ages
For the uses of horror beguiled.

Great God of Despair and of Terror,
Behold our infernal array—
The fruit of lies and of error,
The joys of a devil's play!
In a day the rust will corrode it,
A needless war will destroy;
The furies will reap it that sowed it—
This fiendish, barbarous toy!

Accept the billions we waste on it
That might have been spent for our gain:
The tower of our fool-pride is based on it—
We are right to be boastful and vain.
We soon shall be adding great airships
From which liddite bombs may be hurled;
Then it will not pay to repair ships
That stick to the rim of the world!

So, God of Vengeance and Passion,
Enjoy this sacrifice grand
While still it is quite in the fashion
To waste the wealth of our land.
We lay our lives on the altar,
Our ruin we cheerfully meet;
Oh, let our hearts never falter!
To die for a folly is sweet!

The Treaties Without Amendment.

Views of Senator Isidor Rayner, of Maryland.

Presented in the Senate January 4, 1912.

Mr. Rayner, from the Committee on Foreign Relations, submitted the following views, to accompany Executives H and I, Sixty-second Congress, first session:

The Committee on Foreign Relations having submitted its report to the Senate upon the two treaties, one with Great Britain and one with France, for the arbitration of differences that may arise between these countries and the United States, it is my purpose now as a member of the committee to present my own views upon this subject. It involves as serious and important a question as has been before the Senate for many years. I favor the adoption of the treaties without amendment, but as the reasons that influence me differ somewhat from the views so far advanced I shall proceed to give the reasons that have led me to the conclusion that I have reached to support the treaties without amendment. I shall not discuss the policy that underlies these treaties. I am in favor of the exercise of any lawful power under the treaty-making clause of the Constitution that will tend to bring about the peace of the world, and these treaties are the greatest step in that direction that can at present be formulated. If we can succeed in ending war between the civilized nations of the earth it will be as great an accomplishment as any that was ever achieved upon the pages of history or upon the field of progress. I have not the slightest fear of any danger that may result to our institutions from the adoption of the treaties, nor do I believe for a moment that any of the great governmental principles that lie at the foundation of the Republic will be imperilled; on the contrary, I am buoyant with hope that when the treaties once go into effect they will inaugurate the beginning of universal peace and will relegate the art and practice of war to the barbarous deeds of the past. I shall therefore not say anything further upon the principles that underlie the subject, but shall devote myself to a discussion of the legal and constitutional objections that have been raised against the adoption of the treaties by the majority of the Committee on Foreign Relations.

The first objection that is taken by the majority is to the last clause of Article III of the treaty, and it is thus stated in the report:

"If the joint commission decides that the question before them is justiciable under Article I, it must then go to arbitration, whether the treaty-making power of either country believes it to be justiciable or not."

I am inclined to agree with this construction for reasons that I will give, but I am not inclined to consider that as an objection to the adoption of the treaties. In reference to this point in the majority report, that the decision of the commission is final and that after the commission has decided the question to be *justiciable* that the treaty could not be amended or rejected by the Senate on the ground that the question is *not justiciable,* it seems to me that the opinion that the majority of the committee has reached is correct. To say the least of it, the last clause of Article III is ambiguous when it says that "if the commission agrees and reports that such difference is within the scope of Article I reference shall be made to arbitration in accordance with the provisions of this treaty."

It seems to me that when Article III refers to the provisions of the treaty the reference means that clause of the treaty which provides for submission to the permament court of arbitration at The Hague, established by the convention October 18, 1907, or to some other arbitral tribunal, and does not mean, to my mind, that after the commission decides that the difference is within the scope of Article I the Senate shall have the right to reverse the decision of the joint high commission and hold that it is not within the scope of Article I. It would have been easy enough if it had been the intention of the framers of the treaty that the Senate should have the power to reject the decision of the joint high commission, to have plainly said so in the last clause of Article III. A few words would have accomplished it. A sentence such as this would have settled all possible ambiguity:

"Upon the decision of the joint high commission of inquiry that the difference is subject to arbitration the Senate may then decide upon the adoption, rejection, or amendment of the decision of the joint high commission."

Senator Burton, of the committee, in his supplemental views to the minority report, which are highly instructive and are set forth with great strength and power, takes

an opposite view, and he arrives at the conclusion that when the commission reports that it is a question coming within the scope of Article I, it means nothing more than that the proceedings shall take the same course as they would have taken if the executive branches of both governments had originally agreed that the question came within the meaning of that article. The result of his reasoning is that the language of Article III does not in any way impair the freedom of action reserved to the Senate.

I regret sincerely that, after the most patient reflection upon the subject, I cannot possibly reach this conclusion. The lawyers of the committee and eminent lawyers outside of the committee who have examined the treaty are at odds and at variance upon the proper construction of Article I and Article III. I might ask what is the use of referring it to a joint high commission for a decision if its decision is not binding and can be repudiated by the Senate. It is all very well to say that it is practically impossible that the Senate would ever have occasion to refuse its approval of the arbitration of a question which the commission of inquiry had reported to be within the scope of Article I. The Senate, however, has the power to refuse its approval and it has the unlimited power so to do, as Senator Burton admits, according to his interpretation of the treaty, and to my mind the prime object and intention of the treaty was not to confer this power upon the Senate, but to make the decision of the commission decisive and final.

Senator Burton, in this admirable presentation that he has made, is supported by the very high authority of Secretary Knox, who construes the treaty in a similar way, and also by Professor Moore, of Columbia University, who is recognized as one of the highest authorities, if not the very best, upon this and kindred subjects. Notwithstanding this great support, I cannot place Article I before me and Article III beside it and come to the conclusion that the Supreme Court of the United States would construe the whole of Article I *in pari materia* with Article III, and hold that after a reference to a commission for its decision as to whether a question is justiciable or not, and the commission decides that it is justiciable, that the decision amounts to nothing in the world if the Senate chooses to reject it. This construction of the treaties and of Article III does not in the slightest degree deter me from supporting the treaties because, constituted as the commission will be, I would not hesitate to confide to it the determination of the question whether a controversy between the respective countries is justiciable in law or in equity within the true meaning and intention of Article I of the treaties.

This brings me to the first objection that the majority of the committee have entered against the approval of the treaties by the Senate. This objection had better be stated in the language of the majority report, which reads as follows:

"It is stated that these questions are to be justiciable by reason of being susceptible of decision by the application of the principles of law or equity. In England, and in the United States, and wherever the principles of the common law obtain, the words 'law or equity' have an exact and technical significance, but that legal system exists nowhere else and does not exist in France, with which one of these treaties is made. We are obliged, therefore, to construe the word 'equity' in its broad and universal acceptance as that which 'is equally right or just to all concerned; as the application of the dictates of good conscience to the settlement of controversies.' It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable."

It is true, as stated, that the "system" known as equity does not exist in the jurisprudence of France or in any of the continental countries of Europe. It is not correct, however, to say that "It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable."

The *principles* of equity were well recognized in the early systems of Roman jurisprudence. The Prætorian edicts were partly in the nature of equitable decrees and the prætor occupied a position similar to that of the Lord High Chancellor of England. During the reign of Hadrian these orders and decrees of the prætor were abolished, but from that time to the codification of the Institutes of Justinian equitable principles had a well-known place in Roman jurisprudence under the various laws that were from time to time in vogue. In the institutes of Justinian the division between strictly legal and equitable principles is clearly defined, and from these institutes are derived equitable doctrines and principles that make their appearance in the different systems of jurisprudence that exist in the continental countries of Europe, although there is no separate system of equity as distinguished from that of law. It is therefore going too far to state that there is little or no limit to the questions that might be decided under the definition of "equity" in these treaties. Waiving this, however, and admitting for the sake of argument that in dealing with France the word "equity" would have to be construed in its broadest sense, I cannot for a moment admit that the joint high commission would have the right without limit to construe any question at issue between the respective countries as justiciable for the reasons advanced in the majority report. Giving the commission the broadest jurisdiction as to what is justiciable by the application of the principles of law or equity if the commission should hold that a question is justiciable that does not and cannot come under any definition of equity whatever, in any sense of the word, it would be proceeding beyond its jurisdiction and its decision would be null and void. The majority report construes the treaty to mean that the commission having the power to decide what is justiciable in equity, it would be keeping within its powers under the term "equity" if it held any controversy whatever between the two countries justiciable. This is the language of the report:

"The most vital question in every proposed arbitration is whether the difference is arbitrable. For instance, if another nation should do something to which we object under the Monroe Doctrine and the validity of our objection should be challenged and an arbitration should be demanded by that other nation, the vital point would be whether our right to insist upon the Monroe Doctrine was subject to arbitration, and if the third clause of Article III remains in the treaty the Senate could be debarred from passing upon that question.

"One of the first sovereign rights is the power to determine who shall come into the country and under what

conditions. No nation, which is not either tributary or subject, would permit any other nation to compel it to receive citizens or subjects of that other nation. If our right to exclude certain classes of immigrants were challenged the question could be forced before a joint commission, and if that commission decided that the question was arbitrable the Senate would have no power to reject the special agreement for the arbitration of that subject on the ground that it was not a question for arbitration within the contemplation of Article I."

I venture the assertion that this is not a true and proper construction of the treaty and that no court would so interpret or adjudge it. Let me illustrate this: Suppose arbitrators were appointed to decide a question of "indebtedness" between A and B, and were fully empowered to determine *what should be included* under the term "indebtedness" just as the commission here is authorized to determine what properly comes under the designation of "equity." Suppose in their award they held that A was trespassing upon and had taken possession of the land of B, and should desist from further continuing his trespasses, would anyone suppose that this came within the terms of the award, although the arbitrators had the power not only to decide as to the "amount of the indebtedness," but also as to what was properly *included* under the term "indebtedness?" Why would this award be void? Because a prohibition against A from trespassing upon the lands of B is not an "indebtedness," because it involves a question of title, and they had no right to embrace it, although they had the power to declare what should be included under the word "indebtedness." So here, although the commission has a right to decide what is justiciable according to the principles of law or "equity," it would have no right to decide a subject to be justiciable according to the principles of equity that has nothing to do with equity, and that according to universal acceptation and recognition is not within the domain of equity in any sense whatever. Could anyone successfully maintain the proposition that the Monroe Doctrine could be decided by any principles of equity, giving equity the broadest signification?

If a foreign government should attempt to subvert any of the republican institutions of South America for the purpose of substituting in its stead a monarchical form of government, could it in the realm of reason be maintained that this was a subject to be decided by the principles of equity? If a question arose as to our right to exclude certain classes of immigrants, a right that every government possesses as a matter of self-preservation, could it possibly be claimed in any court of justice called upon to interpret the treaty that this involved a principle of equity? If an attempt was made to compel the United States to pay the indebtedness of a State, could this, under our form of government and under our Constitution, be deemed as constituting an equity against the United States? Is there the slightest doubt that if the commission, although clothed with power to determine what is justiciable according to the principles of equity, should decide that these questions were within its jurisdiction that their decree would be nugatory and that this Government would have the right to reject it? Taking these illustrations as I have done from the majority report and with great respect for those who differ, I must confess I cannot understand how it is possible to arrive at a conclusion that questions like these, embodying as they do historic and traditional doctrines, governmental policies, and constitutional principles, upon some of which the preservation of the Republic depends, could by any intendment or by the widest latitude be held to be within the jurisdiction of the commission, nor have I the slightest apprehension that the commission would ever assume such a jurisdiction.

Any number of judicial authorities could be cited in support of this position that I am taking—judicial authorities not only establishing the proposition that a tribunal legally constituted, as this commission will be, has no power to go beyond the terms of the submission, but when vested with the broad powers that are contained in this treaty to practically determine what the word "equity" means, that it would be without any power to say that "equity" signifies something that under no definition whatever it was ever intended to embrace or comprise. I recall besides the decisions of the courts a diplomatic precedent that I think helps to illustrate the point. The familiar incident was in reference to our northeastern boundary, a question that was settled by the Webster-Ashburton treaty on August 9, 1842. Before this settlement, however, under a convention between the United States and Great Britain, the King of the Netherlands was selected to decide upon the line between the northeastern boundary of the United States and the contiguous British possessions, under the treaty of peace of 1782-1783. It will be observed that he was not limited to the line claimed by the United States nor to the line claimed by Great Britain. He abandoned the attempt to determine upon a line described in the treaty and recommended a line of convenience. When the award was delivered the United States protested against it as constituting a departure from the submission to the arbitrator. The British government declined to construe the award as decisive. The question of acceptance or rejection was afterwards submitted to the Senate, which by a large majority vote determined that the award was not obligatory. So in this case if the commission should hold that a controversy was justiciable, which according to every principle of construction and universal recognition could not possibly come under the definition of equity in its broadest sense, this Government would unquestionably reject it, especially if it left to arbitration subjects like the Monroe Doctrine, or the immigrant laws, or the indebtedness of States for which we are not liable, or any other matter in violation of the Federal Constitution or the statutes of the United States.

I might add that there is no particular objection to a clause being included in the formal ratifications which will operate as a notice to Great Britain and France, and upon their acceptance will practically be a part of the treaty. This is recommended in the minority report at the suggestion of Senator Root. I would take the liberty of suggesting that the clause that the minority report proposes to include in the formal ratifications could be amplified so as to set forth the exact subjects, such as the Monroe Doctrine, the admission of aliens, territorial integrity, alleged obligations of the States, and constitutional questions, in general terms, so that they may be excluded from any construction that may possibly be placed upon the treaties. I do not think this is necessary, and I shall vote for the treaties, even if such a clause is not included in the formal ratification. Of course if this clause is annexed it becomes a part of

the treaty, as has been decided in the case of Doe *v.* Braden (16 How., 635), where it was held that—

"where one of the parties to a treaty, at the time of its ratification, annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, such distinct stipulation or explanation being duly approved by the constitutional authorities of each ratifying power, the declaration thus annexed is a part of the treaty as if it were inserted in the body of the instrument."

The next objection that is made in the majority report is that under Article III the constitutional powers of the Senate are taken away *pro tanto* and are transferred to the commission. If this proposition of law is correct, that would be the end of our power to make the treaty, because the constitutional powers of the Senate cannot be taken away and transferred to anybody. I am discussing this subject from a legal standpoint, and it does seem to me that it is utterly impossible to maintain the statement of the majority of the committee upon this point. In law there is not a particle of difference between the Senate submitting a controversy to arbitration or submitting it to arbitration upon the condition that it will be found by the arbitrators to be justiciable according to the principles of law and equity. The contention could not be maintained that the latter provision would be unconstitutional, and if this is not unconstitutional under an arbitration treaty we could unquestionably permit *an independent tribunal* to ascertain whether it is justiciable or not. In fact, I might go a little further and assert that if the Senate is divesting itself of its constitutional power in adopting this treaty, it has divested itself of its constitutional power in the adoption of every arbitration treaty that has ever taken place between this country and other countries. If we have a right to arbitrate any question of law or equity at all that is justiciable, it appears to me that by logical reasoning that is irresistible we have as much right to constitute a tribunal to decide whether the controversy is justiciable and put that in the treaty as we have the right to enter into any arbitration at all.

During the nineteenth century there have been over 40 international arbitrations to which the United States was a party. I believe that every one of them would fall under the ban pronounced by the majority of the committee against the constitutionality of these treaties. We are not delegating any constitutional power in this treaty. On the contrary, we are in the clear exercise of a constitutional power in making the treaty, and unless the treaty itself contains some provision which is unconstitutional, clearly we are within the limitation. *It is a part of the very treaties that we are making that a commission shall be established for the purpose therein indicated.* Therefore we are exercising the treaty-making power and not delegating or surrendering it. There is another answer to this contention of the majority which, in my judgment, settles the question. In this treaty we have provided the standard that must govern the commission in its rulings. The commission must find that the controversy is justiciable according to the principles of law or equity. When it finds that it is a justiciable question, it has simply determined upon a mixed question of law and fact under the limit and within the boundary that we have set forth in the treaties. This is not delegation of the treaty-making power; if it is, then the decisions of the Supreme Court that hold when Congress provides that duties shall be imposed upon certain imports that the officers of the Government have the right to decide what importations come within the class must all be reversed, and the powers that the President and the Secretary of the Treasury have exercised under similar provisions, sustained by the Supreme Court, must all be set aside. Not only this, but the jurisdiction that the Interstate Commerce Commission is authorized to exercise goes by the board. It has been said that the Interstate Commerce Commission, in fixing rates for interstate transportation, is legislating and usurping the powers of Congress, but an answer to that, an answer that has now been accepted by the courts, is that Congress is legislating in determining that rates must be "reasonable and non-discriminatory," and the Interstate Commerce Commission is not legislating, but is simply fixing and arranging the rates in accordance with the standard provided by Congress.

I am satisfied, therefore, that from any standpoint if this treaty should come before the Supreme Court it could never announce the principle that we are delegating a power committed to us by the Constitution without setting aside and reversing its own decisions.

Having now stated the principal reasons that influence me in giving my support to these treaties, I shall recapitulate the conclusions I have reached.

First. I believe that if the commission decides a controversy to be justiciable that its decision is binding.

Second. The phrase "law or equity" does not, in my judgment, empower the commission to decide any controverted question that may arise under the Monroe Doctrine or the immigration laws, or any subject that may affect the integrity of our institutions or the Constitution of the United States, and so believing, I have not the slightest fear that the commission will ever assume such a jurisdiction.

Third. If the Senate should adopt these treaties there would be no delegation of the treaty-making power and there would be no deprivation of the rights or privileges of the Senate as defined by the Constitution.

Fourth. Satisfied as I am, therefore, that these treaties constitute a valid exercise of the treaty-making power, seeing not the slightest legal difficulty in the way of their adoption without amendment or elimination, and believing that if their interpretation was left to the Supreme Court that this tribunal would unquestionably hold that the treaties without any amendment or elimination whatever are in strict accordance with the requirements of the Constitution, I shall, with intense satisfaction, give them my zealous support, feeling, as I do, that they are supremely in the interest of civilization and humanity.

ISIDOR RAYNER.

The Executive Committee of the North American Gymnastic Union, an organization of two hundred and fifty societies, with a membership of forty thousand American citizens of German descent, have sent a petition to the Senate asking favorable action on the pending arbitration treaties, declaring their belief that such a step will be in furtherance of human progress and civilization.